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OCTOBER TERM, 1952.

No. 287

AL POLIZZI, PETITIONER,

VS.

COWLES MAGAZINES, INC., RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN D. MARSH,
Counsel for Petitioner.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, AL POLIZZI, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit (R. 161) entered in this cause.

OPINIONS BELOW.

The opinion in the Court of Appeals (R. 155-160) has been reported in 197 F. 2d 74.

JURISDICTION.

Judgment was entered on May 23rd, 1952, by the Court of Appeals, for the Fifth Circuit. The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254.

QUESTIONS PRESENTED.

1. Where an Iowa corporation, the owner of a largely distributed magazine employed all its circulation staff, salaried district men, formerly called assistant circulation managers and where such a district man was assigned an area composed of Florida, South Carolina, Mississippi, Alabama and Georgia whose duties were to continually travel the territory to check with regular, systematic, periodic frequency the retail sales-outlets of independent wholesale magazine dealers, arrange with such retail sales-outlets for better display of such magazine and provide and arrange poster display advertising in such retail-outlets promoting the sales of the magazine and see that sufficient numbers of copies were provided retail-outlets, promoting generally the sales and circulation of such magazine in the territory, periodically mail written reports to the New York office of respondent relating to complaints of retailers of insufficient copies or lack of promptness in delivery, meet with wholesale distributors to check and correct complaints of retail-outlets and that such wholesalers use such special poster display advertising material furnished by respondent together with the solicitation of subscriptions by independent agents in Florida and sent direct to respondent and collection by such agents of subscription charges from subscribers in the State of Florida and transmission of such collections less commissions were mailed directly to the respondent, together with

the acceptance of direct mail subscriptions from Florida by respondent in Iowa and the delivery of magazines by mail directly to said subscribers, are such corporate activities sufficient to subject respondent to process in the State of Florida in an action of libel based on libelous statements concerning petitioner, a resident of Florida and published and broadcast in the State of Florida in such magazine owned by respondent?

2. Did the Court of Appeals err in failing to follow herein the formula of this Court laid down in *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation and Placement,* (1945) 66 S. Ct. 154, 326 U. S. 310, that due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice?

STATUTES INVOLVED.

The governing statute of Florida, Florida Statutes Annotated, Section 47.17, provides that if a foreign corporation shall have none of the following officers or agents in the state, viz.: president, vice-president, or other head of the corporation, or cashier, treasurer, secretary or general manager, any director or officer or business agent, resident in the state, then

> "service may be had upon any agent transacting business for it in the State."

The provisions of the Federal Rules of Civil Procedure pertaining to service of process on the questions raised are

found in Sub-sections (d) (3) and (d) (7) of Rule 4, 28 U. S. C. A., which provides as follows:

"(d) Summons: Personal Service. The summons and complaint shall be served together. The Plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: * * *

"(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. * * *

"(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

STATEMENT.

The libel suit of petitioner was originally instituted in a state court of Florida to recover damages of respondent, an Iowa corporation, as the owner of Look Magazine, as the result of false and libelous statements concerning petitioner, a resident of Florida. Jurisdiction of the state court was contested (R. 19) and the case was removed

by respondent to the United States District Court. An additional summons and copy of complaint was served on Paul T. Briardy (R. 57) as a managing agent of respondent transacting business for it in the State of Florida. The return recited that Briardy denied he was such agent or was transacting business for respondent in Florida or was a person authorized to accept process for respondent. Depositions of Paul T. Briardy (R. 58-93) and Marvin C. Wahatmore (R. 94-139) were taken by petitioner for the purpose of establishing respondent's corporate activities in Florida so as to be subject to process in that state and that Briardy was an agent transacting business for it in Florida.

The ultimate facts of corporate activities in Florida recited in petitioner's Number One (1) of Questions Presented herein were established by such depositions.

The respondent owns and publishes Look Magazine. It is an Iowa corporation and maintains offices in Des Moines (R. 96) and offices are maintained in other cities not in Florida (R. 97). It has not qualified to do business in Florida, has no bank accounts there, maintains no telephone listing and has no officers, directors or employees other than Mr. Briardy (R. 131) in Florida.

Orders for Look Magazine are received from wholesale distributors and are sent to a bindery, an independent contractor in Chicago which filled individual orders by shipping direct to independent wholesalers by common carriers (R. 129).

The magazines were distributed to news stand retail dealers in Florida by two independent wholesalers (R. 101-103). Average circulation issue in Florida is 48,000 copies (R. 101). In addition full and part time independent subscription salesmen augment news stand sales

in Florida by mailed copies direct to subscribers by respondent. The collections less commissions are remitted to the subscription office in Des Moines.

Circulation is important as a source of revenue and as a basis for advertising rate structure (R. 99). Respondent employs on its circulation staff; road or district men formerly called assistant circulation managers to continually travel their assigned territories. Paul T. Briardy was so employed for Florida, South Carolina, Mississippi, Alabama and Georgia (R. 107, 64). He was on salary and his duties were to check with regular, periodic frequency retail sales-outlets of the wholesalers, and arrange with retail-outlets for better display of Look Magazines and for poster display advertising and to promote sales of the periodical and see that sufficient numbers of copies were provided retail-outlets, promote the sales and circulation in the territory, periodically mail written reports to respondent relating to retail-outlet complaints as to delivery or insufficient copies, meet with wholesalers to check and correct complaints of retailers and urge wholesaler to use poster advertising material furnished by respondent and correct complaints of retailers. His function was to increase circulation to the best of his ability (R. 108, 65, 66, 74). He had no place of residence and had a letter drop in Miami, Florida, and received all other mail in hotels. (R. 60). His time was fairly well proportioned among the five (5) states of his territory and spent considerable portion of his time in Florida (R. 91-92) and tried to follow a regular itinerary (R. 69).

Advertising displays were also sent direct to retailers by respondent's New York office and also were included in individual magazine bundles (R. 110) to the independent wholesalers. Respondent also accepted direct mail subscriptions in Iowa from subscribers in Florida.

The District Court (R. 143) found respondent was not, at the time of the service of summons, doing business in the federal district of the Court and that the Court did not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code and entered a final judgment dismissing the action *in personam*. An appeal was duly taken to the Court of Appeals for the Fifth Circuit and the judgment of the District Court was affirmed in an opinion (R. 155) as yet unreported.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In affirming the final judgment of dismissal of the District Court holding that respondent was not doing business in the District at the time of the service of summons.
2. In affirming the final judgment of dismissal of the District Court determining that the District Court did not have jurisdiction.

REASONS FOR GRANTING THE WRIT.

The narrow, rigid construction placed by the Court of Appeals herein (R. 159-160) of the term doing business applied to the corporate activities of respondent is in direct conflict with the opinion of this Court in *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation*, (1945) 66 S. Ct. 154, 326 U. S. 310, that due process requires only that in order to subject a defendant to a judgment *in personam* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. See appendix, *infra*, pp. 12-14.

The Court of Appeals of the Fifth Circuit (R. 159-160) held herein:

> "* * * It is true that the approach of some of the recent opinions to the question under review has seemed less rigid in its requirements for jurisdiction than the earlier approach. We think, though, that they, and the new statute which embodies them, must be regarded, not as changing, but as restating and clarifying, the law. They certainly do not furnish warrant for the view pressed upon us by appellant that, because of the activities of Briardy here, the company can be said to be doing business in the state so as to be subject to suit there."

The dissenting opinion (R. 160) of Russell, Circuit Judge, is as follows:

> "The majority opinion sets forth the facts of the case and also the appellant's contentions and citations of the applicable law. I think the authorities relied upon for reversal require that result since, in my opinion, the facts present show that the activities of the defendant (circulation and sale and the promotion thereof) amounted to 'doing business' within the State of Florida; the injury claimed, if existent, is connected with such activities; and the defendant had an agent in Florida upon whom service could properly be effected. Florida Statutes Annotated, Section 47.17 (5)."

Petitioner's action arose and was filed within the State of Florida. The corporate activities of respondent were not irregular or casual, but were substantial and performed with regular, periodic and systematic frequency. The libel action did not arise from any corporate dealings distinct from its Florida operations as the libelous statements, concerning petitioner, a resident of Florida were broadcast and were primarily affected by the large sale,

circulation and distribution in Florida of the May 23, 1950, issue of the national weekly magazine "Look," charging plaintiff with being a member of the Mafia, a criminal gang of great force and power.

There was no warrant or authority given under the International Shoe Case for the Court of Appeals herein (R. 160) to hold:

> "They certainly do not furnish warrant for the view pressed upon us by appellant that, because of the activities of Briardy here, the company can be said to be doing business in the state so as to be subject to suit there."

The Court of Appeals herein unduly restricted and narrowed the application of the rule laid down in the International Shoe Case. The Court of Appeals for the Fifth Circuit in holding that the new federal rule and the International Shoe Case do not change but merely restate the old fiction and concept of doing business overlooked the ruling of this Court in the case last cited that the practical test now followed seeks to determine not whether the acts of the corporate agent within the state are "a little more or a little less," but rather do the contacts as a whole of the corporation within the forum state make it reasonable to require the corporation to defend a suit there. This Court has in the International Shoe Case recognized the economic desirability that if a corporation is to be allowed to go where it wishes, that it must be liable there for its wrongful activities. In a general sense, this Court by adoption of this new means of measurement has given itself opportunity to reexamine each situation anew until some degree of harmony has been achieved among the Federal Courts of Appeal applying the new base or standard of measurement of for-

eign corporate activity within the state as being sufficient to manifest its presence there.

The petitioner contends the Appellate Court erred in failing to apply the said ruling of this Court in the International Shoe Company Case and such decision is also in conflict with the cases of the First,[1] Second[2] and Seventh[3] circuits which have followed and applied the said ruling of this Court in the International Shoe Company Case.

Was the quality and nature of the activity of appellee's agents in Florida such as to satisfy due process requirements by subjecting respondent to an action *in personam* in Florida after service of process upon one employed in the state by the respondent for the purposes and duties Briardy was hired for as a district man at One Hundred Five Dollars ($105.00) a week? We submit that it was. The main purpose of and reason for the activities of respondent's agents operating in Florida, and especially as regards Briardy, was to induce and encourage more and more people in Florida to purchase and read Look Magazine, the very vehicle carrying the alleged defamatory material of which petitioner complains.

The rationale that undertakes an estimate of the inconveniences and applies as a test whether or not the corporate activity has established sufficient contacts or ties with the state of the forum to make it just and reasonable from a standpoint of fair play to make the foreign corporation amenable to process is well demonstrated in the libel action herein.

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[1]*Schmikler* v. *Petersime Incubator Co.*, 177 F. 2d 983, 990.

[2]*French* v. *Gibbs Corporation*, 189 F. 2d 781, decided June 7, 1951.

[3]*Consolidated Cosmetics* v. *D-A Pub. Co., Inc.*, 186 F. 2d 706 (1951).

While exercising the privilege of conducting its many activities within the state the respondent enjoyed the benefits and protection of Florida laws.

For example, if the petitioner had sought by force to prevent Briardy from arranging displays of that issue of Look Magazine which carried the allegedly false and libelous matter designed to injure the petitioner's reputation, or disturbed such displays so the people in his community would not have been attracted to purchase and read that issue, he would have been prohibited from doing so by the laws of Florida where he is a citizen.

Certainly then, the "traditional notions of fair and substantial justice" will not be offended if the respondent is called upon to account for its allegedly unwarranted defamation of petitioner's character in the place where that character and reputation is injured by the acts of the respondent, assisted and abetted by its agents.

To require the petitioner to bring this suit in Iowa where he is unknown; the place of respondent's choosing, would indeed offend our traditional notions of fair play and substantial justice.

As was said in *Clements* v. *MacFadden Publication, Inc.*, 28 Fed. Supp. 274:

> "To carry the present line in holdings to any greater extent than they now exist could easily result in a publication two thousand miles away destroying a man's reputation, whether he be great or small, and requiring him to come to unfriendly territory, perhaps, to effect his vindication in the courts of justice. For this reason and for others it is manifest that the shipment and circulation of printed documents should hardly be grouped and classed with ordinary articles of merchandise."

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN D. MARSH,
Counsel for Petitioner.

August 14, 1952.

APPENDIX A.

In the interest of brevity, a brief would not supplement without over-emphasis, the matters set forth in the petition.

The pertinent portions of this Court's opinion in the often cited case herein of *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation and Placement,* 326 U. S. 310, 90 L. Ed. 95, are as follows:

> "* * * due process requires only that in order to subject a defendant to a judgment *in personam* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' * * * (cases cited) * * *
>
> "Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein* v. *Tax Supers.*, 282 U. S. 19, 24, 75 L. Ed. 140, 143, 51 S. Ct. 15, 13 A. L. R. 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which the courts will deem it be

sufficient to satisfy the demands of due process. L. Hand, Circuit Judge, in *Hutchinson* v. *Chase & Gilbert*, (C. C. A. 2d) 45 F. 2d 141. Those demands may be met by such contacts of the corporation with the state of the forum as makes it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection * * * (case cited) * * *."

The Court, after discussing continuous and systematic activity of a corporation and the casual presence of the corporate agent and his conduct of single or isolated items of activities within a state, said:

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. * * *. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. *Pennoyer* v. *Neff*, 95 U. S. 714 (and other cases cited) * * *.

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue * * * (cases cited) * * *."

As to service upon one of the salesmen in the state, it was said:

"We are likewise unable to conclude that the service of process within the state upon an agent whose activities established appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual.